QUESTION PRESENTED

At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in *Penry v. Lynaugh*, 106 L.Ed.2d 256 (1989); and if not, would the application of a procedural bar to this claim result in a "'fundamental miscarriage of justice,'" *Smith v. Murray*, 477 U.S. 527 (1986)?

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NO. 87-6700

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1989

JOHN HENRY SELVAGE,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent herein,[1] by and through his attorney, the Attorney General of Texas, and files this Brief.

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[1] For clarity, Respondent is referred to herein as "the state" and Petitioner as "Selvage."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is included in the Joint Appendix, hereinafter "J.A.," at pages 68-82. *Selvage v. Lynaugh*, 842 F.2d 89 (5th Cir. 1988). The opinion of the United States District Court for the Southern District of Texas, which is not published, is included in the Joint Appendix (J.A. 63-67). The Order of the Texas Court of Criminal Appeals denying state habeas corpus relief to Selvage, which is not published, is included in the Joint Appendix (J.A. 38-39). The Findings of Fact, Conclusions of Law and Order of the 230th Judicial District Court of Harris County, Texas, recommending denial of Selvage's state habeas corpus application is included in the Joint Appendix (J.A. 29-37). The opinion of the Texas Court of Criminal Appeals affirming Selvage's conviction and sentence is reported at 680 S.W.2d 17 (Tex. Crim. App. 1984).

JURISDICTION

Selvage invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Selvage bases his claims on the Eighth and Fourteenth Amendments to the United States Constitution, which are set out in the Appendix to his brief. Also involved are Article 37.071 of the Texas Code of Criminal Procedure, which is likewise set out in the Appendix to his brief, and Articles 36.14, 36.15, 36.16 and 36.19 of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On December 4, 1979, Selvage was indicted for the capital murder of Albert Garza, the indictment alleging that Selvage murdered the deceased while robbing and attempting to rob Stephen Ventura or, alternatively, that the deceased was a peace officer known by Selvage to be acting in the lawful discharge of an official duty. *See* Tex. Penal Code Ann. § 19.03 (a)(1) and (2) (Vernon Supp. 1989). Upon his plea of not guilty, Selvage was tried before a jury, which on February 4, 1980, found him guilty of the capital offense. After a punishment hearing, the jury on February 11, 1980, affirmatively answered the two special issues submitted to it pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1989). Accordingly, punishment was assessed at death. This conviction and sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1984, with rehearing denied on October 10, 1984. *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984). Certiorari review was not sought.

Rather than seek state collateral review, Selvage filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 and a request for stay of execution in the United States District Court for the Southern District of Texas, Houston Division, and that Court granted a stay of execution on November 8, 1985. The district court subsequently denied habeas corpus relief. *Selvage v. Lynaugh*, No. H-85-6253 (S.D.Tex. March 4, 1986).[2] The district court's judgment was affirmed by

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[2]The district court had earlier denied habeas relief on January 26, 1986, but, upon Selvage's failure to timely appeal,

(Footnote continued on next page)

the United States Court of Appeals for the Fifth Circuit on July 23, 1987, *Selvage v. Lynaugh*, 823 F.2d 845 (5th Cir. 1987), and this Court denied a petition for writ of certiorari on November 2, 1987. *Selvage v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 309 (1987).

On December 10, 1987, the state convicting court scheduled Selvage's execution for January 27, 1988, and, upon Selvage's filing his second state habeas application, modified the execution date to March 30, 1988. On March 14, 1988, the trial court entered factual findings and legal conclusions, recommended that habeas relief be denied and forwarded the writ to the Court of Criminal Appeals (J.A. 29-37), which adopted the trial court's findings and denied habeas relief (J.A. 38-39). *Ex parte Selvage*, No. 16,884-02 (Tex. Crim. App. March 21, 1988).

Simultaneous with the filing of his second state writ application, Selvage filed his second petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division, on January 21, 1988. After state remedies were exhausted, the district court entered an order denying relief on four grounds, including the issue now before this Court. However, the district court granted a stay of execution on Selvage's Eighth Amendment claim asserting a right to question prospective jurors on parole considerations in light of a panel decision of

(Footnote continued from previous page)
vacated this judgment on Selvage's motion pursuant to Fed. R. Civ. P. 60(b) and reinstated the judgment on March 4, 1986. While his Rule 60(b) motion was pending, Selvage filed a state writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1989), which was denied by the Texas Court of Criminal Appeals. *Ex parte Selvage*, No. 16,884-01 (Tex. Crim. App. March 6, 1987).

the Fifth Circuit holding such a right to exist. *See King v. Lynaugh*, 828 F.2d 257 (5th Cir. 1987), *rev'd*, 850 F.2d 1055 (5th Cir. 1988) (en banc), *cert. denied*, ___ U.S. ___, 109 S.Ct. 820 (1989). *Selvage v. Lynaugh*, No. H-88-166 (S.D.Tex. March 25, 1988). The state appealed the granting of the stay, and Selvage appealed the district court's denial of relief on the four claims, seeking a stay of execution pending the appeal. On March 28, 1989, the United States Court of Appeals for the Fifth Circuit vacated the stay of execution and denied Selvage's request for stay pending appeal. *Selvage v. Lynaugh*, 842 F.2d 89 (5th Cir. 1988). This Court granted a stay of execution on the same date. *Selvage v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 1283 (1988), and granted certiorari on October 10, 1989. *Selvage v. Lynaugh*, ___ U.S. ___, 110 S.Ct. 231 (1989).

B. Statement of Facts

1. Facts adduced at guilt-innocence phase of trial

On July 30, 1979, Steven Ventura and two employees, Charlye Jo Ivy and Ken Roberts, were working at the jewelry store Ventura owned in Houston, Texas (R VI 2287, 2293, 2379).[3] The deceased, Albert Garza, a deputy sheriff with the Harris County Sheriff's Department and long-time friend of Ventura, arrived at the store in the late afternoon to visit with Ventura (R VI 2295; 2379, VII 2610). After making several telephone calls, Garza conversed with Ventura, Ivy and Roberts (R VI 2295). Shortly thereafter, a black female, later identified as

[3]"R" refers to the appellate record of Selvage's 1980 trial, consisting of pleadings filed in the trial court and a transcript of the trial, with reference to the volume and the page number located at the bottom left corner of each page.

Brenda Joseph, entered the store and asked Ivy to help her select a birthday present fo her daughter (R VI 2381). Ivy soon became suspicious because the woman could not remember her daughter's birthday (R VI 2382). A few minutes later, Selvage, carrying a brown cloth bag or satchel, and Wilbur Kelly, carrying a dark or blue cloth bag, entered the store (R VI 2296, 2302-03).

While in the store's back office, Ventura, who had seen Kelly and Selvage in the store the previous day and knew that they were not regular customers, became suspicious and informed Garza of his suspicion (R VI 2296-97, 2365-67). Kelly then asked Ventura to see wedding rings while Selvage inquired of a "big diamond" he had previously seen (R VI 2297, 2302; VII 2415-16). After both men repeated their questions, Ventura looked in Garza's direction to indicate his nervousness (R VI 2297). Garza then left the back office, removed his coat, conspicuously displayed his badge and gun, and offered to assist Selvage, thereby separating Kelly and Selvage (R VI 2298-99, 2302).

Ventura then went to the area where Garza and Selvage were to get a layaway ticket (R VI 2304). At that time he observed Selvage in front of Garza and Kelly slightly behind Selvage (R VI 2305). As Ventura leaned over to obtain a layaway ticket, he heard a shot (R VI 2304). Garza fell into Ventura, who ran into the office, where he heard other shots (R VI 2306-07). Obtaining a pistol, Ventura fired at Selvage, whom he observed taking jewelry from a broken showcase (R VI 2307). Selvage leaped to the side, and Ventura heard another shot, which he believed came from Selvage's gun. Ventura fired a second time, and shots were

exchanged (R VI 2307).[4] The two men then ran, with Ventura chasing them, and, in a parking lot around the corner from the store, the two males turned and began shooting at him (R VI 2308-10). Ventura returned fire with two pistols and a shotgun (R VI 2310-12). Selvage and Kelly then got into their car, and Selvage leaned over the top of the car on the passenger side, shooting back at Ventura (R VI 2311; VII 2455, 2462). After Selvage and Kelly fled, Ventura returned to the store to find Garza lying on the floor bleeding from the mouth (R VI 2314); Garza died of a gunshot wound to the neck (R VI 2314; VII 2727-29).

Carl Marlborough, an acquaintance of Selvage and Wilbur Kelly, testified that Kelly and Selvage tried to enlist him for the robbery and that Selvage helped Kelly plan it (R VII 2428-29, 2432-33, 2435).[5] Marlborough procured a pistol, identified as State's Exhibit 66, for Kelly and Selvage (R VII 2688). During the offense, Selvage was carrying a brown bag (R VI 2303). According to Marlborough, the pistol was given back to him by Kelly, but Kelly retrieved the pistol from the brown bag, which Marlborough personally knew to belong to Selvage, out of the trunk of an automobile (R VII 2689, 2692-93). Moreover, while at

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[4]At least three slugs recovered from the interior of Ventura's Jewelry, State's Exhibits 75 (behind credenza), 78 (south wall) and 116 (box in front office), were fired from State's Exhibit 66, the chrome plated Titan .38 Special that Kelly retrieved from Selvage's bag and gave to Carl Marlborough after the robbery-homicide (R VII 2518-19, 2532, 2583-84, 2591-93, 2690-94, 2758-62).

[5]In one of his confessions, Selvage stated that the day before the offense he and Kelly had "spotted" the store. The night before the offense, he asked "Cal" if he could get him a gun and "Cal" procured a chrome plated .38 for Selvage (R VIII 3039). However, Selvage's confessions, though ruled admissible (R III 884), were not introduced into evidence at trial.

the trunk of the car, Marlborough observed a dark colored pistol in the blue bag. Marlborough knew that particular pistol belonged to Kelly (R VII 2690, 2714).[6] At Kelly's request, Marlborough sold State's Exhibit 66 to Johnny Davis (R VII 2692).

2. Facts adduced at punishment phase of trial

Additional evidence was presented at the punishment phase to establish Selvage's willingness to employ lethal force in committing a robbery. Michael Edward McWilliams testified that on July 26, 1979, four days before the instant offense, Selvage and another man attempted to rob the Stop'N Go convenience store at which McWilliams worked (R VII 2834-44). McWilliams was ordered into the bathroom while Selvage and his accomplice set out to rob the store (R VII 2840-41). Selvage returned to the bathroom to ask McWilliams how much money was in

[6]There was conflicting evidence as to which of the robbers possessed which pistol. No person in Ventura's Jewelry could identify any particular weapon as being used by a particular assailant. Mildred Cook, who observed the shootout in the street outside the store, testified that she saw the person leaning over the car on the passenger side, which Ventura identified as Selvage, in possession of the "shiny" pistol, similar to State's Exhibit 66 (R VII 2455, 2458, 2459). Nicholas Bartell, who also observed the shootout in the street, testified that the individual on the driver's side of the Cadillac had the shinier pistol (R VII 2463). Two women who drove by the scene of the shootout and later observed the assailants on a freeway likewise gave conflicting testimony. Judy Cardwell observed the taller of the two black men to be carrying a shiny pistol, similar to State's Exhibit 66 (R VII 2490-91). Previous testimony established that Selvage was the taller of the two assailants (R VI 2352; VII 2397-98). C.D. Bayes, the driver of the car, testified that the taller of the two men had a revolver with a six or seven-inch barrel that was dark and not shiny (R VII 2505-06).

the bottom of the safe and, as he cocked his gun and pointed it at McWilliams, stated that he would shoot McWilliams if he did not tell him how much money was in the bottom of the safe (R VII 2842-44). McWilliams believed Selvage was going to kill him (R VII 2844). Between 30 and 45 minutes after he was forced into the bathroom, McWilliams heard two shots, followed by a scream for help (R VII 2845). When McWilliams came out of the bathroom, he observed Corey Alio wounded by a gunshot in the abdomen (R VII 2846-48). Alio died shortly thereafter.

Al Bell and a friend walked into the Stop 'N Go to buy a frozen pizza. Upon entering, he observed two black men talking, one of whom was Selvage, and did not see the store clerk (R VII 2866-67). As Bell and his friend were in the back of the store, one of the two black men, holding a gun, told Bell and his friend to lie on the floor, where they were searched and their wallets were taken (R VII 2868-69). The second black man told the first to take Bell's watch, but the first black man said "no, you don't want that watch, it's too cheap" (R VII 2869).

In addition to offering penitentiary records establishing that Selvage had been convicted on two prior occasions, in 1976 for conspiracy to commit bank robbery and in 1972 for possession of a controlled substance (R VIII 3210), the state offered the testimony of Captain Ronald L. Cherry of the New Orleans Police Department. Operating on information received in the New Orleans Police Department House of Detention, Cherry apprehended Selvage, housed in the maximum security area of the prison, as he escaped from that institution in 1975 (R VII 2896-98). Investigation revealed that Selvage, with the assistance of a second person, smuggled a chisel and sledge hammer into the prison, chiseled through some concrete pilings and

attempted to lower himself from the sixth floor by a rope made of torn blankets (R VII 2898, 2899-2900). The rope broke, causing Selvage to drop four floors and sustain bodily injury (R VII 2898).

Selvage introduced testimony from his sister, Audrey Picou, that he had been a non-aggressive, church-going person while growing up in New Orleans. Selvage was interested in art and music and was an honor student in high school (R VII 2907-09). Rather than attend college, Selvage was drafted into the military, where he served from 1968 through 1970. Selvage was sent to Southeast Asia, but returned in a "strait jacket," suffering from heroin addiction (R VII 2909-10). He was treated in Houston and Florida before being released (R VII 2910). However, from the time of his return from Southeast Asia, Selvage was a changed person (R VII 2911). Selvage was able to obtain work (R VII 2910-11), and Picou never saw Selvage under the influence of drugs, nor did Selvage smoke marijuana or drink liquor while he was in her presence (R VII 2911). Selvage would visit Picou once or twice a week (R VII 2913). Picou characterized Selvage as a follower (R VII 2911) and stated she never saw Selvage with a weapon, never saw him act violently and considered him non-violent (R VII 2912).

Selvage further offered the testimony of Dr. Jose Garcia, Chief of Medical Health Services for the Texas Department of Corrections Mental Association (R VII 2925). Dr. Garcia described several penitentiary programs that would be available to treat Selvage and the testing and therapies available to use in rehabilitative planning (R VII 2926, 2928-31). Garcia further testified to the drug rehabilitation programs available in the Department of Corrections (R VII 2933-34) and that he had never encountered an inmate who could not be helped by the programs (R VII 2935-36).

3. Facts adduced in state habeas corpus proceedings

In his state habeas corpus application, Selvage offered five pieces of evidence: a summary by an Air Force doctor, dated February 5, 1970, *Ex parte Selvage*, No. 16,884-02 at 44-45; excerpts from Selvage's medical record while in federal prison, *id.* at 47-57; a letter detailing an evaluation of Selvage's mental status from Dr. James Merikangas, dated January 20, 1988, *id.* at 77-81; Texas Department of Corrections medical clinic notes covering the period February 7, 1985, through December 11, 1986, *id.* at 83-95; and an affidavit from John Emmett Crow, Selvage's trial counsel, executed on January 19, 1988. *Id.* at 97-100. In his summary, Air Force Dr. Don G. Fenner stated Selvage complained that for two months he could not concentrate at work, causing Selvage's supervisor to "get mad at him." Selvage complained to Fenner of hearing "voices" that would keep him up at night. Selvage's sergeant also asked Fenner to see Selvage after he threatened to kill the supervisor; however, before he could be seen for the evaluation, Selvage rammed his fist through a window to catch the people who were "spying" on him. Selvage also complained that he and his supervisor had multiple disagreements, that the supervisor believed his work was poor because he was "on drugs," and that he felt people were watching him everywhere. While Selvage acknowledged taking barbiturates prior to entering the Air Force, he denied drug use subsequent to enlisting.

Selvage submitted to urinalysis, which was "within normal limits." The doctor concluded that the auditory hallucinations were "questionable" and had subsided. His IQ tested at 78, and he remained quiet, aloof and withdrawn in group therapy sessions. The doctor diagnosed Selvage as possessing "depressive

neurosis" and "passive-aggressive personality," and, because of his low intelligence and "slow, rather stubborn lifestyle," recommended that Selvage be medically discharged.

Selvage's federal prison medical records reveal that Selvage received Dilantin, Cogentin and Thorazine in 1977 and 1978, and was evaluated for residual back, foot and head injuries. *Ex parte Selvage*, No 16,884-02 at 47-57.

Dr. Merikangas described Selvage's medical and mental history and the results of various reflex tests performed, most of which appeared normal, but "some minor reflex asymmetries and sensory findings [are] suggestive of a brain injury." Merikangas then described a "psychotic break" of Selvage's that occurred between Merikangas' two visits. Merikangas then opined that Selvage was not fully responsible for his capital murder due to a combination of psychosis and the residual effects of "severe" drug abuse, which diminished his ability to appreciate the wrongfulness of his conduct and rendered him less than capable of conforming his conduct to society's norms. Selvage's "probable" brain injury[7] compounded preexisting

[7]As one progresses through Dr. Merikangas' letter regarding an evaluation conducted *nine years* after Selvage's crime, it is noted that Marikangas continues to elevate his description of the physical condition of Selvage's brain. He originally notes that, despite the fact that all cranial nerves are normal and there is no indication of epilepsy, "minor" reflex asymmetries and sensory findings are "suggestive" of brain injury. However, in formulating his opinion in hindsight on Selvage's mental status nine years earlier, Merikangas declares brain injury to be "probable." The Court should note that Selvage has *never* produced *any* evidence of brain injury, despite the availability of extensive neurological testing equipment at the Texas Department of Corrections, where Dr. Merikangas performed his examination (R VII 2929-30).

psychosis because such an injury lowers a person's ability to control impulses, likely causing Selvage to misperceive simple gestures as threatening. Thus, in Merikangas' opinion, Selvage *could* have been unusually susceptible to coercion, influence and designs of others. Moreover, Merikangas concluded that, if maintained on proper medication, Selvage poses no more of a threat for future violence than any non-psychotic person. Merikangas concluded his evaluation by stating that Selvage's prior mental history was easily obtainable by any person who wanted to look for it and any open-minded person would have perceived his symptomology.

In his January 19, 1988, affidavit, attached hereto as Appendix A, Selvage's trial attorney, John Crow, stated that he and co-counsel decided at an early stage that they would not present evidence of mental illness at the punishment phase of trial because the jury would not have been able to consider such evidence as mitigating. In light of the state's practice at the time of trial of presenting psychiatrists who would testify that mental disorders increased the likelihood of future violence, the state would have been able to convert otherwise mitigating evidence into aggravating evidence. Moreover, Crow stated that, although mental disorder was relevant to the question whether Selvage acted deliberately, the jury would have no meaningful way of considering such evidence as a mitigating circumstance. In Crow's opinion, Selvage's jury could have readily determined his actions to be sufficiently deliberate to satisfy Texas' capital sentencing statute, and juries would rarely find mental illness sufficiently incapacitating to interfere with a defendant's ability to engage in deliberate conduct.

In a subsequent affidavit executed on February 16, 1988, and offered by the state, attached hereto as Appendix B, Crow explained his first affidavit. Crow and co-counsel were appointed to represent Selvage prior to his arrest in New Orleans. Upon Selvage's arrest, counsel travelled to New Orleans and met with him on two occasions to discuss his case. Selvage was lucid and coherent, soft-spoken and well-mannered and able to remember details of the offense as well as the manner in which his two confessions were taken. Selvage consistently claimed that Kelly was the triggerman in the robbery-homicide.

Selvage gave counsel no reason to believe that he was anything other than sane or competent. His confessions, testimony in the pretrial hearings, communication with counsel and asking of pertinent questions demonstrated his competence to counsel. Moreover, counsel interviewed Selvage's family and learned of his stable family life prior to entering the military and his changed behavior after discharge. Selvage's family stated that Selvage had no prior psychiatric treatment or mental problems. Counsel inquired of Selvage whether he had any prior mental history and, while counsel could not remember his precise answer, he felt certain that the response conformed with his personal observations.

Selvage's family attributed his changed behavior to hard drug addiction. The fact that Selvage had been discharged from the military for use of alcohol and/or drugs, as disclosed by the prosecution, was consistent with the family's conclusion. Thus, while counsel believed Selvage suffered from a serious heroin habit and was probably under the influence of drugs at the time of the offense, voluntary intoxication and diminished capacity were not defenses under state law, and counsel did not believe that Selvage suffered from

any mental defect that would have interfered with his ability to know right from wrong or to conform his conduct to the requirements of law. Had counsel believed Selvage had such a defect, counsel would have secured a psychiatric examination, regardless of his perceptions regarding trial strategy and presentation of psychological evidence as a mitigating factor.

Counsel thus devised a trial strategy focusing on identity at guilt-innocence by suggesting that some other person, perhaps Eugene Waddis, accompanied Wilbur Kelly and Brenda Joseph. Second, the defense attempted to demonstrate that Selvage was a non-triggerman and, thus, could not be found to have deliberately caused the death of the deceased, as required by the first special punishment issue. Counsel decided as a strategic matter not to present psychological evidence regarding drug problems and attendant drug-related mental conditions. Counsel believed that juries were just as likely to consider such evidence aggravating as they would consider it mitigating. Likewise, counsel was dissuaded by the possibility of the state rebutting any psychological evidence in mitigation with harmful evidence discovered in an evaluation. Hence, counsel decided on a strategy to introduce equivalent evidence without bearing such a risk. By introducing the testimony of Selvage's sister, which detailed his family background and accomplishments as a young adult, his addiction to heroin and his resultant behavioral change in conjunction with Dr. Garcia's testimony regarding the treatment programs available in prison, counsel believed he provided the jury with a basis for concluding that Selvage would not be a continuing threat to society.

SUMMARY OF ARGUMENT

The Court should not address Selvage's argument that the state procedural bar was not properly applied in his case, because it was neither presented to nor addressed by the courts below. Selvage did not maintain, either in the trial court or the Court of Criminal Appeals, that the state's contemporaneous objection rule is not regularly and consistently applied to claims such as his, or that it is not based on an adequate and independent state law ground, nor did he object to its imposition on this basis in federal court. Indeed, in his federal habeas petition and in his petition for writ of certiorari, he acknowledged the legitimacy of the bar by attempting to show cause for his failure to timely object, and by arguing that application of the procedural default doctrine would result in a fundamental miscarriage of justice. Further, his argument is outside the scope of the question on which certiorari was granted, and the Court will consider such issues only in exceptional circumstances. Selvage points to no such circumstances in this case and none exist.

Even were the Court to consider Selvage's claim, it is meritless. As for his assertion that Texas courts will treat *Penry* claims under their novelty exception to the contemporaneous objection rule, that is solely a matter of state law over which this Court has no supervisory authority. Further, Selvage's claim that the Court of Criminal Appeals does not consistently impose its procedural bar is belied by the facts. In most of the cases cited by Selvage, the defendants challenged the constitutionality of the Texas capital-sentencing statute on its face, rather than as applied, as Selvage does. The few instances where the court did address unpreserved claims do not undermine the validity of the Texas rule. In cases such as Selvage's,

the state courts have consistently and routinely applied their procedural bar to review of the claim. Finally, the Texas contemporaneous objection rule has an independent state basis. In Texas, the failure to object to jury instructions at trial waives all but fundamental error. "Fundamental error" is a narrow concept, and is not co-extensive with constitutional error. In fact, it is well settled under Texas law that even constitutional rights are waived by the failure to object. An error is fundamental only if it is so egregious that the defendant has not had a fair and impartial trial. The court's analysis of fundamental error focuses on the nature of the harm suffered by the defendant, not the nature of the alleged error. Thus, the rule is not dependent on a determination of the validity of the underlying constitutional claim.

Under this Court's precedents, the perceived futility of obtaining relief will not satisfy the cause prong of the procedural default doctrine. On the other hand, where the factual or legal basis for making a claim was novel and not reasonably available at the time of trial, the cause requirement is met. The tools for making a claim are available when existing case law would allow an attorney to reasonably extrapolate and apply the principles to his own case. The facts that other attorneys were making similar arguments and that the claims were being recognized in other courts are significant factors in determining whether a claim was available to a particular defendant. The claim Selvage now makes plainly was not novel at the time of his 1980 trial. The legal basis for his claim was announced by this Court in 1976 in *Woodson v. North Carolina* and *Jurek v. Texas*, and further refined in *Lockett v. Ohio* in 1978. Similar claims had been perceived and were being made in reported state court cases well before Selvage's trial. Finally, Selvage's trial attorney has acknowledged in his affidavit that he

was aware that the jury would not be able to consider certain of his evidence as mitigating. Consequently, his failure to object to the trial court's jury instructions cannot be excused by the novelty exception to the procedural default doctrine.

Valuable considerations are furthered by rejecting the concept of futility as cause for a procedural default. The development of the law will be fostered by requiring that issues not yet firmly established be litigated at the trial and direct appeal level, rather than in collateral proceedings. Moreover, both the adversary system and criminal defendants will benefit where counsel has incentive for raising perceived constitutional violations at the time they occur. Further, comity and finality, important aspects of our system of federalism, will be furthered by requiring that constitutional claims be litigated and resolved in state court. As co-equal protectors, with the federal courts, of constitutional rights, the state courts will be encouraged to act responsibly and conscientiously in reviewing claims of constitutional violations. The criminal trial will be, as it should be, the main event, where issues of guilt and innocence and proper punishment are decided at a time when the facts can most accurately be developed.

This Court has long recognized that the federal courts have a duty to prevent the application of the procedural default doctrine from producing a fundamental miscarriage of justice. In most cases victims of such miscarriages of justice will be able to meet the cause and prejudice requirements to defeat imposition of a procedural bar. The Court has fashioned an exception for the extraordinary case where a constitutional violation has resulted in the conviction of an actually innocent person. Selvage's attempt to enlarge this exception to include a deprivation of a "basic trial

process" is devoid of factual and legal support. His claim that the trial court's failure to *sua sponte* instruct the jury on consideration of mitigating evidence amounted to such a deprivation ignores the operation of state law. He cannot deny that the procedures were in place under state law for him to request special instructions at trial, nor can he deny that state law did not prohibit the giving of such instructions. Further, there was no impediment to his introduction of the evidence he now proffers, and if the trial court had limited the admissibility of his evidence, he could have perfected a bill of exceptions. Thus, he can claim no deprivation of a basic trial process. His characterization of *Penry* error as *per se* harmful and a denial of a basic trial process is contrary to this Court's decision in *Franklin v. Lynaugh*.

A defendant can show his actual innocence of the death penalty by establishing that he is a member of a class for whom the death penalty is unavailable as a matter of constitutional or state law. Selvage can make no such showing. While it would be appropriate for the Court to end the inquiry at this point, should the Court wish to allow a petitioner to demonstrate his actual innocence through evidence that mitigates against but does not prohibit a death sentence, it should adopt a rule requiring the petitioner to demonstrate the existence of mitigation so compelling that no rational fact-finder would have concluded that death was appropriate. Selvage's evidence, including his newly proffered psychiatric evidence, which is of questionable reliability, falls far short of meeting this standard.

ARGUMENT

I.

SELVAGE'S CLAIMS THAT PROCEDURAL DEFAULT IS NOT REGULARLY APPLIED IN TEXAS AND THAT THE PROCEDURAL BAR IS NOT AN INDEPENDENT STATE GROUND EXCEED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND, THUS, ARE NOT PROPERLY BEFORE THE COURT; ALTERNATIVELY, TEXAS COURTS DO ROUTINELY AND REGULARLY APPLY PROCEDURAL BARS TO REVIEW OF *PENRY* CLAIMS AND TEXAS' PROCEDURAL REQUIREMENT IS AN INDEPENDENT STATE GROUND.

A. The Court should not address arguments which exceed the scope of the question presented and which were neither presented to nor considered *sua sponte* by the courts below.

Selvage argues that the Court should ignore his procedural default for three reasons. First, Selvage asserts that the state courts' imposition of a procedural bar to review should not be honored because it has not been routinely and regularly applied by the state courts in the past. Second, he asserts that this Court should interpret Texas law and conclude that the procedural bar would now be excused because the Court's constitutional rule announced in *Penry v. Lynaugh*, ___

U.S. ___, 109 S.Ct. 2934 (1989), was not recognized in Texas at the time of his trial. Finally, he asserts that procedural default is inappropriate because the state court rule is dependent on a federal constitutional ruling and, thus, is not an "independent" state ground.

In his brief on the merits, Selvage for the first time asserts that the procedural bar imposed by the Texas courts is not an independent and adequate state ground that will foreclose federal review of his claim. Although he now claims that state law required review of *Penry* claims at the time of his trial, Selvage never made such an argument either at the time the state asserted in state court the existence of a bar to review or at the time that the state courts imposed the bar. At no time in federal court did Selvage rely on this argument to avoid the consequences of his procedural default, and the record is devoid of briefing or factual development on this issue. The issue of the adequacy and independence of the state procedural ground was not mentioned in Selvage's petition for certiorari review and is beyond the scope of the question upon which this Court granted certiorari. In addition, the brief of *Amicus* Harvey Earvin attempts to inject factual matters into this case that were not presented to or considered by the lower federal courts.

The Court has jurisdiction in a case coming from federal court to consider an issue not raised below. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). It will not do so, however, in the absence of exceptional circumstances. *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There are no exceptional circumstances here that would warrant the Court's consideration of Selvage's new argument that the Texas procedural bar should be disregarded in this case. For example, his argument is not made as an alternative basis in

support of the judgment of the court below. *Berkemer v. McCarty*, 468 U.S. at 436 n.23. Rather, he seeks to set aside the judgment of the court of appeals for reasons that he could have, but did not, present to that court. In addition, the state strenuously objects to the argument being made for the first time in Selvage's brief on the merits. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258 (1987) (Court will not exercise jurisdiction where issue was not argued in court of appeals, petition for writ of certiorari did not present the issue, and respondent vigorously objected to issue being raised at first point she had notice that question was being presented, *i.e.*, in her response to brief on the merits); *cf. Carlson v. Green*, 446 U.S. at 17 n.2 (issue not raised in lower court would be considered by Supreme Court where respondent did not object to having question decided).[8]

Indeed, in his Motion to Certify Question to Texas Court of Criminal Appeals, filed in the Court on November 9, 1989, Selvage admitted that the Fifth Circuit's determination that the state courts relied on procedural default "found support in state law." *See* Motion to Certify Question to Texas Court of Criminal Appeals at 2. Having once conceded that the procedural bar rested on adequate and independent state law grounds, Selvage should not be heard now to complain that it does not. Moreover, Selvage further conceded the independent and adequate character of the state rule by asking the Court in his petition for writ of certiorari to consider whether he had established "cause" for his procedural default and, if not, whether imposition of the procedural bar would result in a fundamental miscarriage of justice. *See* Petition for Writ of Certiorari at 10-14. Thus, it cannot be said that this issue is "fairly included" within the question on which certiorari was granted. Sup.Ct.R. 21.1(a).

[8]The state nonetheless has briefed the issues improperly presented by Selvage, not in acquiescence to his action but solely to provide the Court with the state's position should the Court decide to address the issues. This briefing should not be considered consent on the state's part, and the state reiterates its strenuous objection to Selvage having improperly raised new issues.

B. Texas courts have consistently and regularly imposed a procedural bar to foreclose review of claims alleging erroneous jury instructions during capital sentencing proceedings.

Under Texas law, alleged error concerning jury instructions is generally waived or not preserved for review where the defendant did not object to the jury instructions actually given or request special instructions. Tex. Code Crim. Proc. Ann. arts. 36.14, 36.15, 36.19 (Vernon Supp. 1989); *Johnson v. State*, 629 S.W.2d 731, 733 (Tex. Crim. App. 1981); *Duffy v. State*, 567 S.W.2d 197, 204 (Tex. Crim. App. 1978). The Court of Criminal Appeals of Texas has regularly applied a procedural bar to capital defendants' claims that the jury instructions in their cases were constitutionally inadequate to allow for consideration of their mitigating evidence. *Perillo v. State*, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3263 (1989) (noting that the defendant did not object to the jury instructions and that such claims have been rejected even with timely objection); *Pyles v. State*, 755 S.W.2d 98, 123 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 543 (1988) (finding "[n]othing is preserved for review" in connection with the defendant's challenge to Texas capital sentencing statute, because he did not object to the statute or jury instructions and presented no mitigation evidence); *Fierro v. State*, 706 S.W.2d 310, 318 (Tex. Crim. App.

1986) (because defendant failed to object or request instructions, nothing is presented for review); *[Anthony Charles] Williams v. State*, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981), *cert. denied*, 455 U.S. 1008 (1982) (because of the failure to object or request instructions, nothing is presented for review).

Moreover, the Court of Appeals for the Fifth Circuit has correctly recognized that the Court of Criminal Appeals has applied a procedural bar to foreclose review of death-sentenced petitioners' claims that punishment-phase jury instructions were insufficient to provide full consideration of their mitigating evidence. *Fierro v. Lynaugh*, 879 F.2d 1276, 1281 (5th Cir. 1989); *McCoy v. Lynaugh*, 874 F.2d 954, 958 (5th Cir.), *stay denied*, ___ U.S. ___, 109 S.Ct. 2114 (1989); *King v. Lynaugh*, 868 F.2d 1400, 1403 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1563 (1989); *Bridge v. Lynaugh*, 856 F.2d 712, 713, *on reh'g*, 863 F.2d 370 (5th Cir.), *stay granted*, ___ U.S. ___, 109 S.Ct. 20 (1989); *Bell v. Lynaugh*, 858 F.2d 978, 981 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3262, *reh'g denied*, ___ U.S. ___, 110 S.Ct. 223 (1989); *Landry v. Lynaugh*, 844 F.2d 1117, 1122 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 248 (1988); *[Calvin Joseph] Williams v. Lynaugh*, 837 F.2d 1294, 1296 (5th Cir. 1988); *Streetman v. Lynaugh*, 835 F.2d 1519, 1520 (5th Cir.), *stay denied*, ___ U.S. ___, 108 S.Ct. 588 (1988); *see also Thompson v. Lynaugh*, 821 F.2d 1054, 1062-63 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 5 (1987) (recognizing state courts' imposition of procedural bar to foreclose review of alleged error stemming from trial court's failure to instruct the jury on inapplicability of law of parties at the punishment phase of trial).[9]

[9]In addition, the state is aware of at least ten cases in which on state habeas review the Texas Court of Criminal Appeals has imposed a procedural default to review of death-sentenced

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Many of the cases cited by Selvage and *Amicus* Harvey Earvin for the proposition that the Texas courts have not regularly imposed procedural bars involved facial, rather than as applied, challenges to the capital sentencing scheme. *Motley v. State*, 773 S.W.2d 283, 286 (Tex. Crim. App. 1989); *Wilkerson v. State*, 726 S.W.2d 542, 547-48 (Tex. Crim. App. 1986); *Williams v. State*, 674 S.W.2d 315, 321 (Tex. Crim. App. 1984); *Adams v. State*, 577 S.W.2d 717, 729-31 (Tex. Crim. App. 1979), *rev'd on other grounds sub nom. Adams v. Texas*, 448 U.S. 38 (1980).

For example, in *Motley v. State*, 773 S.W.2d at 286, the defendant claimed that the absence of a statutory definition of "deliberately," as utilized in the first special sentencing issue, precludes the jury from considering mitigating circumstances. He did not contend that he presented evidence that could not be given mitigating effect because of the lack of a definition. The Court of Criminal Appeals rejected this facial challenge and, in any event, concluded that

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petitioners' claims that the jury instructions were constitutionally inadequate to allow for consideration of mitigating evidence. *Ex parte Curtis Lee Johnson*, Application No. 15,840-02 (Tex. Crim. App. October 19, 1987); *Ex parte Mario Marquez*, Application No. 17,898-01 (Tex. Crim. App. January 4, 1988); *Ex parte Robert Nelson Drew*, Application No. 13,998-02 (Tex. Crim. App. June 14, 1988); *Ex parte Curtis Paul Harris*, Application No. 17,919-01 (Tex. Crim. App. August 19, 1988); *Ex parte Federico Martinez Macias*, Application No. 17,991-03 (Tex. Crim. App. October 25, 1988); *Ex parte Harold Amos Barnard*, Application No. 14,264-04 (Tex. Crim. App. January 6, 1989); *Ex parte Paul Rougeau*, Application No. 19,419-01 (Tex. Crim. App. March 7, 1989); *Ex parte James Michael Briddle*, Application No. 20,103-01 (Tex. Crim. App. April 14, 1989); *Ex parte Billy Joe Woods*, Application No. 10,855-02 (Tex. Crim. App. July 7, 1989); *Ex parte James Emery Paster*, Application No. 15,995-02 (Tex. Crim. App. September 19, 1989).

Motley had no standing to make such a challenge because he had not shown that the statute had such an effect in his case.

Similarly, in *Williams v. State*, 674 S.W.2d at 321, the defendant:

> "challenge[d] the constitutionality of Art. 37.071(b)(1), V.A.C.C.P. as this Court has construed it by its decisions following *Jurek v. Texas*, 428 U.S. 262 . . . (1976). Appellant contends that this Court's interpretation of Art. 37.071(b)(1) has so limited the deliberateness issue as to no longer include proper consideration of miti-gating evidence. . . ."

The Court of Criminal Appeals rejected his interpretation of its case law construing "deliberately" and overruled his attack on the constitutionality of the first punishment phase issue. A fair reading of *Williams* demonstrates that the defendant was not challenging the instructions given in his case but rather the Court of Criminal Appeals' "narrow" construction of the term "deliberately."

In *Adams v. State*, 577 S.W.2d at 729, the Court of Criminal Appeals again was confronted with a challenge to the facial validity of Tex. Code Crim. Proc. Ann. art. 37.071. Adams contended that the statute was unconstitutional because it did not provide standards to allow the jury to determine whether a convicted capital murderer "ought to die," or provide for a life sentence even if all the special sentencing issues were answered in the affirmative. The Court of Criminal Appeals' rejection of the facial challenge to the statute, *id.* at 730, provides absolutely no support for Selvage's belated contention that the state court

does not consistently or regularly impose its procedural bar to unpreserved as-applied challenges.

The defendant in *Wilkerson v. State*, 726 S.W.2d at 547-48, likewise mounted a facial attack on the constitutionality of the Texas capital-sentencing statute. He asserted that the second special sentencing issue was impermissibly vague in that predictions of future dangerousness are inherently speculative and the undefined term "probability" is a source of ambiguity and vagueness; Wilkerson did not, however, contend that the alleged vagueness operated to prevent the jury from considering mitigating evidence. The Court of Criminal Appeals did not neglect to impose an otherwise applicable procedural bar.

Thus, the Court of Criminal Appeals of Texas has regularly applied its procedural rule to death-sentenced defendants' claims that the statutory sentencing issues, in their particular cases, unconstitutionally precluded the jury from considering mitigating evidence. Consequently, the Texas contemporaneous objection rule is "adequate" and should be respected by the federal courts. *Dugger v. Adams*, ___ U.S. ___, ___, 109 S.Ct. 1211, 1217 n.6 (1989). The few cases cited by Selvage and *Amicus* Harvey Earvin are insufficient to undermine the adequacy of the state procedural rule. *Id.*

C. The state courts' contemporaneous objection rule is an "independent" state ground.

Selvage contends that the procedural bar imposed in his case should not be respected because of the possibility that Texas courts might, at some point in the future, determine that this Court's decision in *Penry v. Lynaugh*, ___U.S. ___, 109 S.Ct. 2934 (1989),

constitutes a sufficient change in the law to excuse the absence of a contemporaneous objection. The Texas Court of Criminal Appeals employs a state law standard to determine whether a decision of this Court is so novel that a criminal defendant's failure to preserve error is excused.

> [W]here a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver.

Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984), *cert. denied sub nom. Texas v. Chambers*, 474 U.S. 864 (1985) (Campbell, J., concurring). Thus, whether a *Penry* claim would fall within the novelty exception recognized by the Texas courts is exclusively a matter of state law, *id.*, and this Court neither exercises supervisory authority over state courts nor sits to decide questions of state law. *See Smith v. Phillips*, 455 U.S. 209, 221 (1982).

Moreover, "a state's subsequent acceptance of an argument ... is irrelevant to the question whether the default should be excused on federal habeas." *Smith v. Murray*, 477 U.S. 527, 534 (1986). Thus, this Court's review is properly limited to the question upon which certiorari was granted: whether at the time he was tried Selvage had cause for his failure to object which would overcome the procedural bar imposed by state courts and whether the preclusion of federal habeas review based on the state courts' imposition of the bar would result in a fundamental miscarriage of justice.[10]

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[10]As set forth in the state's Opposition to Motion to Certify Question to Texas Court of Criminal Appeals, Selvage's assertion that the Court of Criminal Appeals might in the future find the decision in *Penry* to constitute a sufficient change in the law to

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Relying on *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), Selvage also asserts that the ruling of the court below does not rest on state law grounds which are "independent" of his federal constitutional claim, because *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), requires the Court of Criminal Appeals to consider whether an asserted charging error is "fundamental" before applying the statutory contemporaneous objection rule, and in making this determination the court necessarily reached the merits of his Eighth Amendment claim. Thus, he argues that, because the state court necessarily considered his Eighth Amendment claim, the state procedural rule is not an "independent" state ground which can foreclose from federal habeas review his challenge to the failure to instruct the jury on consideration of mitigating evidence.

Contrary to Selvage's assertion, the Court of Criminal Appeals was not required to consider the merits of his Eighth Amendment claim before determining that he did not assert fundamental error which would negate the contemporaneous objection requirement. Rather, the sole inquiry inherent in the state's fundamental error analysis is whether the error resulted in such egregious harm that it deprived him of a fair and impartial trial. *See Almanza v. State*, 686 S.W.2d at 171.

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excuse the procedural default is contrary to the established precedent of that court. Moreover, even assuming, *arguendo*, that at some future date the Court of Criminal Appeals decides that *Lockett*-type claims are sufficiently novel as a matter of state law to excuse a failure to comply with state procedure, Selvage, like Chambers, would have an available forum and remedy in the Texas courts.

In Texas, review of jury charge error is governed by Tex. Code Crim. Proc. Ann. arts. 36.14-36.19 (Vernon 1981). Article 36.14, addressing objections to the charge and the requirements to preserve resulting error, provides, in pertinent part:

> Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts, and in no event shall it be necessary for the defendant or his counsel to present special requested charges to preserve or maintain any error assigned to the charge, as herein provided. . . . Compliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof.

Article 36.15, governing requested special charges, states, in pertinent part:

> The defendant may, by a special requested instruction, call the trial court's attention to error in the charge, as well as omissions therefrom, and no other exception or objection to the charge shall be necessary to preserve any error reflected by any special requested instruction which the trial court refuses.

Article 36.19, governing the scope of appellate review of errors not preserved under Articles 36.14 and 36.15, states:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of trial.

Thus, absent an objection or a specially requested instruction, a criminal defendant waives all but fundamental error. *Grady v. State*, 614 S.W.2d 830, 831 (Tex. Crim. App. 1981); *White v. State*, 610 S.W.2d 504, 506 (Tex. Crim. App. 1981). Under Texas law, the spectrum of "fundamental" error is exceedingly narrow, and the unobjected-to error which Selvage now raises falls outside those limited parameters. To support a claim of fundamental error in the jury charge, a criminal defendant must show "egregious harm."

> [I]f no proper objection was made at trial and the accused must claim the error was "fundamental," he will obtain reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial"-- in short "egregious harm."

Almanza v. State, 686 S.W.2d at 171. This fundamental error inquiry clearly would not require the Court of

Criminal Appeals to consider the merits of Selvage's Eighth Amendment claim.

To the extent that Selvage asserts that no objections or special requested instructions were necessary to preserve error pursuant to Article 36.19 because the trial court's failure to *sua sponte* instruct the jury on consideration of mitigating evidence constituted fundamental error, it is clear that he raises an issue of state law which is not properly a subject of federal habeas review. *See Smith v. Phillips*, 455 U.S. at 221. Moreover, his apparent assertion that, in the aftermath of *Penry v. Lynaugh*, the Court of Criminal Appeals is likely to change its determination that the omission of a punishment-phase instruction concerning mitigating evidence is not fundamental error, is contrary to established state precedent.

Under Texas law, a criminal defendant is entitled to a charge on a defensive theory raised by the evidence. *Lugo v. State*, 667 S.W.2d 144, 146 (Tex. Crim. App. 1984); *Garcia v. State*, 605 S.W.2d 565 (Tex. Crim. App. 1980). Nevertheless, the Court of Criminal Appeals has consistently rejected the proposition that a trial court's failure to *sua sponte* submit defensive issues constitutes fundamental error. *See Johnson v. State*, 629 S.W.2d at 733; *Boles v. State*, 598 S.W.2d 174 (Tex. Crim. App. 1980) (failure to charge on lesser included offense); *Perez v. State*, 495 S.W.2d 242 (Tex. Crim. App. 1973) (failure to submit issue of entrapment or status as an accommodation agent for state's witness); *White v. State*, 495 S.W.2d 903 (Tex. Crim. App. 1973) (failure to submit issue of mere presence at scene of drug sale); *Martinez v. State*, 448 S.W.2d 488 (Tex. Crim. App. 1970) (failure to submit issue of self-defense).

Although Selvage has yet to articulate the punishment phase instruction which he claims should have been submitted at his trial, the type of instruction to which he alludes is in the nature of a defense to the death penalty. That is, Selvage claims entitlement to an instruction by which the jury could find him guilty of capital murder beyond a reasonable doubt; find beyond a reasonable doubt that the special sentencing issues should be answered affirmatively; and yet decline to impose the death penalty because of some excuse which reduces his culpability. *See Barnette v. State*, 709 S.W.2d 650, 652 (Tex. Crim. App. 1986) (the nature of defenses to conviction is to allow the jury to find that the state has proven the elements of the crime and nonetheless find the defendant not guilty).

The Court of Criminal Appeals confronted a similar situation to that posed by Selvage's claim in *Johnson v. State*, 629 S.W.2d at 733, a capital murder case in which the evidence adduced at trial raised the issue of provocation by the deceased. Because there was evidence that the deceased shot at the defendant prior to the capital murder, the capital sentencing statute, Tex. Code Crim. Proc. Ann. art. 37.071 (b), mandated submission of a third special sentencing issue on provocation. Although the Court of Criminal Appeals recognized that the imperfect self-defense claim may have been sufficiently mitigating to militate against a death sentence, it nonetheless held that the trial court's failure to *sua sponte* submit the third special issue did not constitute fundamental error. *Id.* at 733. *Cf. Evans v. State*, 601 S.W.2d 943 (Tex. Crim. App. 1980) (refusal to submit a special issue on provocation *after defendant's timely request* constitute reversible error). Since omission of defensive issues at the guilt-innocence phase or the third special issue at the punishment phase are not fundamental error, it follows that subordinate issues relating to mitigating

evidence similarly are not considered fundamental error under Texas law.

Moreover, the fact that an asserted error arguably implicates a constitutional provision does not make it a fundamental error for which no objection is required for appellate review. It is well settled under Texas law that even constitutional rights may be waived by the failure to object at trial. The Court of Criminal Appeals has not hesitated to impose a procedural bar in the face of constitutional claims not timely asserted. *See, e.g., Russell v. State*, 665 S.W.2d 771, 778 (Tex. Crim. App. 1983) (Fourth Amendment claim); *Rogers v. State*, 640 S.W.2d 248, 265 (Tex. Crim. App. 1982) (alleged due process violation in proceedings revoking probation); *Mathews v. State*, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989) (equal protection claim pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Little v. State*, 758 S.W.2d 551, 563 (Tex. Crim. App. 1988) (admission of evidence implicating constitutional rights); *Crawford v. State*, 617 S.W.2d 925, 940 (Tex. Crim. App. 1980) (claim pursuant to *Adams v.Texas*, 448 U.S. 38 (1980), of denial to right to fair and impartial jury); *Darland v. State*, 582 S.W.2d 452, 456 (Tex. Crim. App. 1979) (Fourth Amendment claim); *Mendoza v. State*, 552 S.W.2d 444, 450 (Tex. Crim. App. 1977) (error in admission of testimony concerning proceedings revoking probation where defendant not represented by counsel); *Thompson v. State*, 537 S.W.2d 732, 735 (Tex. Crim. App. 1976) (admission of constitutionally invalid prior conviction); *Dunlap v. State*, 477 S.W.2d 605, 606 (Tex. Crim. App. 1971) (Sixth and Fourteenth Amendment claims regarding tainted in-court identification); *Ex parte Bagley*, 599 S.W.2d 332, 333 (Tex. Crim. App. 1974) (Fifth Amendment violation).

That the state's statutory procedural default rule constitutes an adequate and independent state ground is in no way undermined by the fundamental error exception. The state courts were not required to consider the merits of Selvage's Eighth Amendment claim before declining to apply the fundamental error exception. In addition, Selvage's apparent assertion that the state courts would properly find the error presented to be fundamental only raises an issue of state law which is not properly the subject of federal habeas review. Moreover, Selvage's assertion of fundamental error under state law is contrary to established state precedent and to the results actually reached by the court below.

II.

JUREK V. TEXAS, WOODSON V. NORTH CAROLINA AND LOCKETT V. OHIO PREDATED SELVAGE'S TRIAL, OTHER COUNSEL PERCEIVED THE CONSTITUTIONAL CLAIM PRIOR TO HIS TRIAL AND SELVAGE'S COUNSEL ACKNOWLEDGED HE KNEW OF THE BASIS FOR THE CLAIM. THEREFORE, SELVAGE'S *PENRY* CLAIM WAS NOT NOVEL AT THE TIME OF TRIAL AND SELVAGE CANNOT ESTABLISH CAUSE FOR HIS PROCEDURAL DEFAULT.

A. The Court should adhere to its consistent past pronouncements that futility will not constitute cause for a procedural default.

Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny, the independent and adequate state

ground of procedural default ordinarily will bar federal habeas review of a state prisoner's constitutional claim unless he can show "cause" for the default and resulting "prejudice." *Dugger v. Adams*, ___ U.S. ___, ___, 109 S.Ct. 1211, 1215 (1989); *Harris v. Reed*, ___ U.S. ___, ___, 109 S.Ct. 1038, 1043 (1989). The Court's delineation of the contours and parameters of the procedural default doctrine has been guided by considerations of comity and finality and by the scope and costs of the collateral remedy of habeas corpus.[11] Accordingly, the meanings of "cause" and "prejudice" are to be informed by the policies of comity and finality. *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

To establish cause for a procedural default, therefore, a habeas petitioner must generally show that "some objective factor external to the defense" impeded counsel's ability to comply with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Under this standard, the cause requirement is satisfied when "the factual or legal basis for a claim was not reasonably available to counsel." *Id.*, *citing Reed v. Ross*, 468 U.S. 1, 16 (1984). However, "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated the claim, the demands of comity and finality counsel against labelling alleged unawareness of the claim as cause for a procedural default." *Engle v. Isaac*, 456 U.S. at 134. For like reasons, counsel's alleged perception that presenting an available claim to the state courts would

[11]In *Engle v. Isaac*, 456 U.S. 107, 126-29 (1982), the Court recognized that collateral review undermines the policies of repose and finality of litigation by extending the "ordeal of trial;" detracts from the prominence society has attached to the criminal trial itself; prevents society from punishing unquestionable offenders because the passage of time renders the remedy of retrial impossible; and frustrates the good-faith efforts of state courts to implement and enforce constitutional rights.

be futile cannot constitute cause for a procedural default. *Id.* at 130 n.36.

Relying on language taken from *Reed v. Ross*, 468 U.S. at 17-18, Selvage urges that the perceived futility, renamed "foreclosure," of presenting his *Lockett*-type[12] claim to the Texas courts constitutes cause for his failure to preserve the claim as required by state law. Because *Reed* excused a procedural default where the legal basis for the claim was "reasonably" unavailable, he argues that his default of an available claim should be excused because, given his perception that state and federal relief was foreclosed, counsel's failure to object was "reasonable." *Reed* obviously does not stand for this proposition.

Reed addressed the broad issue of *novelty* as cause in the specific context of retroactive application of a constitutional principle that was not recognized at the time of the default. *Id.* at 17. The holding of *Reed* reflects the fundamental inequity of depriving a defendant of the benefit of retroactive application of a new constitutional rule representing a "clear break with the past," solely because his attorney failed to preserve the claim at a time when its legal basis was not available.[13] Moreover, as the Court later explained in *Smith v. Murray*, 477 U.S. 527, 537 (1986), a

[12]*Lockett v. Ohio*, 438 U.S. 586 (1978).

[13]Given the specific context in which *Reed* arose, the Court's analysis of novelty as cause for a procedural default logically drew upon the novelty formulation utilized in retroactivity cases. The Court's reliance on *United States v. Johnson*, 457 U.S. 537 (1982), suggests that only those "new" constitutional principles which represent a "clear break with the past" are sufficiently novel to excuse a procedural default. *See Griffith v. Kentucky*, ___ U.S. ___, ___, 107 S.Ct. 708, 714-16 (1987) (identifying "clear break" subset of "new" rules).

comparison of *Reed v. Ross* and *Engle v. Isaac* establishes that the novelty of a constitutional claim constitutes cause for a procedural default of that claim only in a narrow category of cases--those in which the legal basis for the claim was not available at all.

Counsel may possess the foresight to anticipate an as yet unrecognized constitutional principle, the acceptance of which would represent a "clear break with the past." Under these circumstances, however, there will almost never be an available legal foundation for counsel to rely upon. *Reed v. Ross*, 468 U.S. at 17. Only in these cases where the basis for a constitutional claim is not available at all, should counsel's perception that it would be futile to preserve or present possible error be sufficient to excuse his failure to do so.[14] The novelty exception already excuses such defaults, and there is, accordingly, no reason for the Court to revisit its proper rejection of futility as cause.

1. The meaning of "availability," in light of *Reed v. Ross* and *Engle v. Isaac*.

The novelty of a constitutional claim constitutes cause for a procedural default only in those cases where the legal basis for the claim was wholly unavailable. In *Engle v. Isaac* and *Reed v. Ross*, each habeas petitioner contended that the State's assignment of the burden of proof on certain affirmative defenses violated due process requirements by effectively shifting to the defense the burden of disproving an essential element of the offense charged. Thus, the only variable factors in the Court's analysis of cause were the timing of the

[14]As discussed *infra* at 44-50, this approach accords appropriate deference to the demands of comity and finality while recognizing the institutional needs of the legal system.

default and concurrent state of the law. The foundation for the legal claim in *Engle v. Isaac* was provided by *In re Winship*, 397 U.S. 358, 364 (1970), where the Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court explicitly acknowledged the connection between this due process principle and the allocation of the burden of proof by invalidating Maine's practice of requiring defendants to negate the element of malice by proving that they acted in the heat of passion arising from sudden provocation.

Although two of the *Engle* petitioners were tried in the period between *Winship* and *Mullaney*, the broad due process principle announced in *Winship* provided the tools by which their attorneys could reasonably extrapolate and raise the narrower issue which was directly addressed in *Mullaney*. The fact that other defense counsel had perceived and litigated the claim in the interim between *Winship* and *Mullaney* demonstrated the reasonable availability of the claim. Although lower courts were recognizing claims similar to the one subsequently adopted in *Mullaney*, this factor was not dispositive. The Court took care to note that "[e]ven those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time." *Engle v. Isaac*, 446 U.S. at 133 n.41.

In contrast, Reed was tried in 1969, prior to *Winship*. At that time, *Leland v. Oregon*, 343 U.S. 790 (1952), had placed the stamp of approval on the long established and widely accepted practice of requiring the defendant to prove certain affirmative defenses by

holding that the states could require a defendant to prove insanity beyond a reasonable doubt, even though the existence of insanity also tended to negate the culpable mental state necessary to constitute the crime. *Leland* arguably sanctioned the practice of some states of allocating burdens of proof on affirmative defenses which negated essential elements of the offense, and *Winship* made clear that such practices would violate due process requirements. Because this Court had not announced the foundation principle for Reed's claim at the time of his default, and no other source provided a basis for asserting the claim, cause existed for his counsel's failure to preserve the error.

2. The legal basis for Selvage's claim was available at the time of the default.

Similarly, the Court's decisions in the 1976 death penalty cases clearly established the legal basis for Selvage's defaulted claim. In passing upon the constitutionality of various state responses to *Furman v. Georgia*, 408 U.S. 238 (1972), a plurality of the Court held that the Eighth Amendment requires an individualized capital-sentencing determination under a scheme that allows the sentencer to decline to impose the death penalty on the basis of mitigating evidence. For example, in holding the mandatory North Carolina death penalty scheme unconstitutional, the plurality stated:

> "A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. . . . A process which accords no significance

> to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. . . . [T]he Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Additionally, in gauging the constitutionality of the Texas capital sentencing scheme, the plurality noted:

> "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.
>
> Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."

Jurek v. Texas, 428 U.S. 262, 271 (1976). *Woodson* and *Jurek* announced the broad Eighth Amendment principles which apply in the context of capital sentencing and provided the foundation for Selvage's defaulted claim in the same manner that *Winship* laid the basis for the *Engle* and *Reed* petitioners' claim.

With respect to the development and application of existing foundation principles, *Lockett v. Ohio*, 438 U.S. 586 (1978) is in Selvage's case the equivalent of *Mullaney v. Wilbur* in *Engle v. Isaac*. In *Lockett*, the Court was asked to directly determine "which facets of an offender or his offense it deemed 'relevant' in capital sentencing [and] what degree of consideration of 'relevant facets' it would require." 438 U.S. at 604. The *Lockett* plurality held that "relevant facets" are "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* With respect to the degree or type of consideration, the plurality concluded that a constitutionally acceptable capital-sentencing scheme must allow the sentencer to consider a "relevant facet" in a manner which can "affect the sentencing decision" in a mitigating fashion. *Id.* at 604, 608.

The Ohio statute at issue in *Lockett* required imposition of the death penalty in particular cases unless the defendant established at least one of three statutory mitigating factors. Facially, the statute provided for consideration of all of the "relevant facets" identified by the Court in *Lockett*: "the nature and circumstances of the offense and the history, character, and condition of the offender." *Lockett*, 438 U.S. at 607, 612-13. Moreover, the Ohio Supreme Court had held that the statutory mitigating circumstances were to be "liberally construed in favor of the accused." *Id.* at 608, *citing State v. Bell*, 48 Ohio St.2d 270, 281, 358 N.E.2d 556, 564 (1976). The statute did not, however, allow the *degree* of consideration required by the Constitution, because non-statutory mitigating factors could be given no effect in the sentencing decision except

insofar as they shed some light on the narrow circumstances delineated in the statute.[15]

Lockett, *Woodson* and *Jurek* provided Selvage's trial counsel with the tools for constructing the argument that this Court accepted in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989). Selvage could have asserted that the Texas capital sentencing issues, as applied in his case, operated in the same unconstitutional fashion as the narrow statutory mitigating circumstances set forth in the Ohio statute and that the Texas special issues prevented his jury from considering specific evidence in a manner that would have mitigating effect on the sentencing determination. Indeed, this Court has held that *Lockett* dictated the rule which Penry sought and that *Jurek* imposed the obligation which *Penry* enforced. *Penry v. Lynaugh*, ___ U.S. at ___, 109 S.Ct. at 2947.

Moreover, at the time Selvage was tried, various *Lockett*-type claims had been raised in state court and reported in published opinions. *Quinones v. State*, 592 S.W.2d 933 (Tex. Crim. App.), *cert. denied*, 449 U.S. 893 (1980); *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979), *rev'd on other grounds sub nom.*

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[15]*Lockett* hardly constituted blanket approval of the Texas capital-sentencing procedures. The plurality explicitly stated that none of the statutes approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases "clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Lockett*, 438 U.S. at 607. Although the Court did not specifically mention the possibility that supplemental instructions might be necessary, under the Texas capital sentencing scheme, to allow the jury to consider specific types of mitigating evidence, that issue was irrelevant to its consideration of the Ohio death penalty statute at issue in *Lockett*.

Adams v. Texas, 448 U.S. 38 (1980); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978); *King v. State*, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1088 (1978). Finally, in an affidavit offered by Selvage, trial counsel attested to an awareness at the time of trial that "the jury would not be able to consider [certain] evidence as a mitigating circumstance." *See* Appendix A at A-1.

B. The policies which give rise to the procedural default doctrine will be undermined if counsel's "reasonable" perception of futility is sufficient to constitute cause for a procedural default.

1. Institutional or systemic considerations are furthered by rejecting the concept of futility as cause.

Both the development of the law and the adversarial process depend upon attorneys who seek to extend the application of available legal principles to new, though arguably analogous, factual situations. A rule such as the one sought by Selvage, which removes what might be counsel's only incentive -- avoidance of a procedural default -- for performing this often difficult task would wreak havoc on the entire judicial system.

a. Evolution of the law

The evolution of constitutional principles depends on the disposition of specific cases. Certainly, the power of this Court, as ultimate expositor of constitutional law, is limited to the adjudication of actual cases and controversies. U.S. Const., art. III § 2; *Griffith v. Kentucky*, ___ U.S. at ___, 107 S.Ct. at 713.

The entire legal system thus benefits from, and indeed relies upon, the litigation of issues that are not firmly established. Collateral review is not now, and should not be, the primary vehicle for the development of the law.

It is true that a court which has not accepted the merits of an argument premised upon constitutional principles that have not yet been applied in a particular context might summarily reject subsequent efforts to assert the claim. The mere fact that the claim is being repeatedly advanced, however, might cause the court to rethink its earlier position: where competent and ethical counsel persistently rely on an available constitutional principle to attack some aspect of state proceedings, the court could well determine that its earlier analysis was ill considered, superficial or even erroneous. Moreover, with proper development, the facts of a particular case could serve to clarify the gist of the claim and, ultimately, persuade a court as to the merits of an argument previously rejected.

State capital-sentencing procedures are subjected to a high degree of federal judicial regulation. In this respect, as with the nature of the penalty, death is different. Given the large body of Eighth Amendment jurisprudence which has developed in a relatively short period of time, and the all too lengthy process by which a capital case wends from trial to direct appeal and federal habeas corpus, it would be difficult to ever show that a particular claim was asserted by dozens of defendants within a relatively short period of time. For the same reason, a specific claim, based upon an available Eighth Amendment principle, which has not been specifically rejected by this Court in an identical context, cannot be deemed totally foreclosed.

b. Adversary system

The adversary system would be undermined if the perceived futility of presenting an available claim constituted cause for the failure to do so. However reasonable the perception of futility might be, attorneys would have no incentive to raise, or factually develop, such claims. The result would ill serve both the legal system and criminal defendant.

By enforcing a procedural bar only in cases where the legal tools were available to construct the defaulted claim, the Court does not require counsel to "exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." *See Engle v. Isaac*, 456 U.S. at 131. It is, however, entirely appropriate to charge counsel with the obligation of preserving and raising claims where the law has provided him with the tools for constructing the applicable argument.

Under this standard, a competent attorney will not necessarily litigate, or even perceive, every constitutional claim which is reasonably available. Nonetheless, the Court's formulation does not lend itself to inequitable results. An attorney is most likely to perceive and litigate a claim when the constitutional principle involved is likely to have a real effect in his client's case. Thus, those defendants who stand to receive the greatest benefit from the application of a constitutional principle are the most likely to make an objection in a timely fashion. *See Sykes*, 433 U.S. at 90 ("If a criminal defendant thinks that an action of the state court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.").

Moreover, one important function of trial counsel is to assist the court. Although the determination whether a particular jury instruction is proper does not rest on considerations of credibility and demeanor of witnesses, defendants and their attorneys nonetheless owe trial courts a duty to apprise them of the reasons why particular evidence was introduced and why special instructions are necessary to insure that the jury can appreciate its significance. Evidence believed by a defendant to be mitigating or to have mitigating value beyond the scope of the special issues might not be so perceived by the trial judge unless the defendant makes an objection on that basis. It is clear that certain, perhaps most, mitigating evidence can be given full consideration by the jury in answering the special punishment issues. *Franklin v. Lynaugh*, 487 U.S. ___, ___, 108 S.Ct. 2320, 2330 (1988). Potential errors in the charge stemming from misperceptions of the evidence can be corrected only with a timely objection by the parties. On the other hand, when the defendant raises no such objection, the court is justified in concluding that the defendant believed that the mitigating effect of his evidence was fully obvious to the jury and could readily be taken into account in answering the punishment issues. *Cf. Lowenfield v. Phelps*, ___ U.S ___,___, 108 S.Ct. 546, 552 (1988) (Silence by counsel indicative that prejudice to client not perceptible at time of trial).

c. Comity

Likewise, comity considerations are furthered by the limitation of the novelty exception to procedural defaults to unavailable or unknowable, as opposed to seemingly futile, constitutional claims. State courts are given respect by the federal courts because the states are primarily responsible for creating and enforcing criminal laws. *See Engle*, 456 U.S. at 128.

Of course, the states also serve as initial guardians of federal constitutional rights, *id.*, and federal habeas corpus is designed to provide an incentive for state courts to conscientiously and diligently perform this function. *Desist v. United States*, 394 U.S. 244, 262-63 (1969). If attorneys were obliged to raise and preserve only those constitutional claims that are well established and widely accepted in the factual situations involved in their cases, state courts would be relegated to the role of automatons which mechanically apply black letter law. Where courts become accustomed to such a limited role, as they surely would if counsel were absolved of any responsibility for litigating knowable claims, they will be less likely to appreciate the nuances which inhere in, and the policies which underlie, broad constitutional principles. Were the perception of futility to constitute cause for a procedural default, therefore, an important foundation of federalism would be undermined.

Thus, state courts are provided an opportunity to pass upon claims of constitutional error and, if necessary, to reconsider the propriety of their previous rejections of the claims. *Smith v. Murray*, 477 U.S. at 535. State courts admittedly do not always follow the spirit as well as the letter of the law, but the letter of the law is more readily discernible. A process which utilizes zealous advocates to persuade, and even educate state courts as to the spirit of the law will promote decisions in conformity with that spirit. By drawing the line at "availability," moreover, the Court has refused to allow state courts to be subjected to an inundation of claims whose basis would only be found in the fertile minds of imaginative counsel. The Court appropriately balanced and accommodated these weighty considerations when it concluded that "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that

claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default." *Engle*, 456 U.S. at 134. Selvage presents no valid reason for the Court to depart from this principle.

d. Finality

By requiring counsel to preserve all available constitutional claims at the time of trial, in accordance with state procedural rules, the interests of finality will be served. Factual issues bearing on the result of the trial will be developed at the time of trial. Because the passage of time results in the dispersion of witnesses and the fading of memories, the facts developed at the time of trial are likely to be more accurate than those developed thereafter. Moreover, society has marshalled its resources at the point of trial, to ensure decisions which are as accurate and reliable as humanly possible, and there is a substantial societal interest in having all relevant facts developed at this stage of the criminal proceedings.

The history of this case illustrates the necessity of ensuring that relevant facts are developed at the appropriate time. For example, Selvage propounds as mitigating evidence the results of a psychiatric examination which was conducted in 1988, some eight years after his trial and nine years after his commission of the capital murder. It is sheer speculation to state whether Selvage's mental condition in 1988 is the same or even similar to his mental condition at the time of trial and at the time he committed the capital offense.

If Selvage's argument is accepted, counsel will have no incentive to develop facts pertaining to capital sentencing at the time of trial, and the floodgates will

be open to factually meritless claims. Certain evidence may in the abstract possess mitigating qualities, particularly with the benefit of the twenty-twenty hindsight inherent in habeas litigation. Nonetheless, this evidence might not, in practice, be perceived by juries as mitigating so as to persuade them to act in a compassionate fashion. Competent and experienced trial counsel are in the best position to assess whether the abstract mitigating value of evidence is likely to find favor with local juries.

III.

SELVAGE'S PROCEDURAL DEFAULT IS NOT EXCUSED BECAUSE THE LACK OF SPECIAL INSTRUCTIONS IN SELVAGE'S CASE DID NOT RESULT IN A DEATH SENTENCE IMPOSED ON A PERSON WHO IS "ACTUALLY INNOCENT" OF SUCH A SENTENCE.

There being no good cause for his procedural default, Selvage next urges that the imposition of a procedural default in his case would result in a fundamental miscarriage of justice. He asserts that, this Court's established precedent notwithstanding, *see Dugger v. Adams*, ___ U.S. at ___ n.6, 108 S.Ct. at 1217 n.6; *Smith v. Murray*, 477 U.S. at 537-39, the requirement of a showing that a constitutional error probably resulted in the conviction of a person who is actually innocent to establish a fundamental miscarriage of justice should be inapplicable here because the alleged *Penry* error in his case deprived him of a "basic trial process." Alternatively, Selvage argues that the alleged *Penry* error in his case probably resulted in the imposition of a death sentence to a person who is undeserving of it.

A. Selvage's proposal that a "fundamental miscarriage of justice" should be unrelated to his actual innocence is foreclosed by well established precedent of this Court and, if adopted, would eviscerate the procedural default doctrine.

From the inception of the procedural default doctrine, the Court has recognized that the principles of comity and finality that underlie the doctrine must not intrude on the federal courts' duty to prevent miscarriages of justice. In *Wainwright v. Sykes*, 433 U.S. at 90-91, the Court recognized the inherent right of a federal court to correct miscarriages of justice and that the "cause and prejudice" rule of *Francis v. Henderson*, 425 U.S. 536 (1976), would not prevent the federal courts from so acting. The Court declined to elaborate on what constituted a miscarriage of justice. *Sykes*, 433 U.S. at 91.

In *Engle v. Isaac*, the Court reiterated its holding in *Sykes*, rejecting a claim that the procedural default doctrine should be limited to constitutional claims that do not affect the truth-finding function of the trial. *Engle*, 456 U.S. at 129. Moreover, while again recognizing that the principles of comity and finality underlying the procedural default doctrine "must yield to the imperative of correcting a fundamentally unjust incarceration," the Court felt confident that victims of a "fundamental miscarriage of justice" will meet the cause and prejudice standard of *Sykes*. *Id.* at 135. The Court again did not define the parameters of a miscarriage of justice.

In *United States v. Frady*, 456 U.S. 152 (1982), the Court defined the degree of prejudice necessary to

excuse a procedural default. Recognizing the rule of *Henderson v. Kibbe*, 431 U.S. 145 (1977), limiting habeas relief to errors of greater prejudice to petitioners than "plain error," the Court held the prejudice prong of *Sykes* to be satisfied only upon a showing that the errors worked to a petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *Frady*, 456 U.S. at 170.

Murray v. Carrier, 477 U.S. 478 (1986), was a case involving a defaulted *Brady v. Maryland*, 373 U.S. 83 (1963), claim. Noting its language in *Engle*, the Court reiterated that the federal courts will look beyond principles of comity and finality to redress miscarriages of justice, and that, for the most part, victims of a fundamental miscarriage of justice will meet the cause and prejudice standard of *Sykes*. *Carrier*, 477 U.S. at 495-96. Thus, the Court rejected the dissent's proposal that the requirement of cause be dispensed with in favor of an inquiry into whether there had been a "manifest injustice" or denial of "fundamental fairness," involving either a federal right of "fundamental importance" or a violation of a right that "calls into question the accuracy of ... guilt." *Id.* at 492-95. The Court noted that this was nothing more than a restatement of the prejudice requirement of *Sykes*. *Id.* at 493-95.

However, the Court recognized that the cause and prejudice standard would not always prevent fundamental miscarriages of justice:

> Accordingly, we think that *in an extraordinary case*, where a constitutional violation has *probably resulted in the conviction of one who is actually innocent*, a federal habeas court may grant the writ in the

> absence of a showing of cause for the procedural default.

Id. at 496 (emphasis added). Thus, the Court for the first time gave definition to the concept of a fundamental miscarriage of justice: conviction of a person who is probably actually innocent.

The *Carrier* Court further noted that the right to assert claims of ineffective assistance of counsel further operates as a safeguard against miscarriages of justice and that the presence of such a safeguard assists in determining the standard governing the exercise of discretion in reviewing procedurally defaulted claims. *Id.* at 496. The Court, noting Carrier's failure to assert any impediment preventing counsel from raising the *Brady* claim in state court and his disavowing any claim of ineffective assistance of counsel, then concluded that Carrier's claim must be dismissed for failure to establish cause under *Sykes* unless the *Brady* material established his actual innocence. *Id.* at 497.

In a case decided the same day as *Carrier*, the Court revisited the issue of miscarriage of justice, this time in the context of capital sentencing. *Smith v. Murray*, 477 U.S. 527 (1986). In *Smith*, the petitioner failed to comply with state procedure, resulting in his default of a claim of the improper admission of psychiatric testimony at the punishment phase of trial, in violation of this Court's rule in *Estelle v. Smith*, 451 U.S. 454 (1981). Having found that the *Estelle v. Smith* claim was deliberately abandoned by appellate counsel due to perceived futility and that such a claim was not novel, the Court held that the petitioner failed to establish cause for his default. *Smith v. Murray*, 477 U.S. at 533-37. Turning to the question of miscarriage of justice, the Court, acknowledging difficulty in translating actual innocence in the context of capital

sentencing, found that the error did not produce false facts nor did it preclude the development of true facts. Therefore, the Court concluded that the case did not present a risk of a fundamental miscarriage of justice. *Id.* at 537-38.[16] The Court did not attempt to define the concept of actual innocence in a capital sentencing context.

The Court's final foray into the question of a fundamental miscarriage of justice exception to the procedural default doctrine occurred in *Dugger v. Adams*, ___ U.S. ___, 109 S.Ct. 1211 (1989). In that case, the petitioner failed to raise on appeal a claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), relating to the trial judge's misinforming the jury on its responsibilities under Florida law, thus resulting in a procedural default. Because the essence of a *Caldwell* claim is that the jury is misinformed of its duties in violation of state law, a failure to object under state law would support the imposition of a procedural default even though *Caldwell* had not been decided at the time of trial or appeal. *Dugger v. Adams*, ___ U.S. at ___, 109 S.Ct. at 1215-18. Having failed to establish cause for his default, Adams asserted that his procedural default should be excused because the *Caldwell* error resulted in a fundamental miscarriage of justice. The Court disagreed. While again declining to define actual innocence, the Court held that the fact that the trial judge found an equal number of aggravating and mitigating circumstances did not cause the failure to

[16]The Court in *Smith v. Murray* did not, as implied by Selvage, hold that a finding that false facts were admitted or true facts were omitted would end the inquiry into whether there has been a fundamental miscarriage of justice. The most that can be implied from the Court's language is that the Court would then look at the entire factual posture, excluding the false facts and including the true facts to determine whether the petitioner has demonstrated his actual innocence of the death penalty.

properly instruct the jury on its responsibility under state law to constitute a fundamental miscarriage of justice. *Dugger v. Adams*, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6. The Court further rejected the dissent's assertion that a miscarriage of justice occurs when a petitioner makes a substantial claim that a constitutional violation undermined the accuracy of the sentencing determination. The Court stated:

> We reject this overbroad rule. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which the error results in a fundamental miscarriage of justice, the "extraordinary case," *Carrier, supra*, 477 U.S. at 496, into an all too ordinary one.

Dugger v. Adams, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6.

Selvage, like the dissenting Justices in *Carrier*, *Smith* and *Dugger v. Adams*, attempts to carve an exception to the actual innocence requirement to demonstrate a miscarriage of justice. He asserts that claims of constitutional errors which deprive a defendant of a "basic trial process," *see Rose v. Clark*, 478 U.S. 570, 578 n.6 (1986), should constitute a miscarriage of justice independent of its effect on his actual innocence. Review of Selvage's claim, however, reveals that it is devoid of factual and legal support.

Selvage's claim that the failure of the trial court to *sua sponte* instruct the jury on its consideration of

mitigating evidence acted to deprive him of a "basic trial process" ignores state law. Texas provides a process for requesting special instructions to be added to a court's charge or to otherwise object to the charge. Tex. Code Crim. Proc. Ann. arts. 36.14, 36.15 (Vernon Supp. 1989). Selvage points to no ruling of the Court of Criminal Appeals holding a trial court's giving of such an instruction to be erroneous, and none exists. Likewise, Selvage cannot contend that state evidentiary rules preclude the admission of the evidence he now proffers. Indeed, the Court of Criminal Appeals will not hesitate to reverse a case where mitigating evidence is excluded. *See, e.g., Burns v. State*, 761 S.W.2d 353 (Tex. Crim. App. 1988). Moreover, if the trial court denied a special instruction and counsel believed that had the effect of excluding evidence, he would be free to perfect a bill of exception demonstrating the evidence he felt precluded from presenting. *See* Tex. R. App. P. 52 (Vernon Supp. 1989).[17] There clearly were numerous tools at Selvage's disposal to mount his defense.[18]

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[17]Indeed, in support of his objection to the imposition of the death sentence on the basis that non-triggermen were exempt from such punishment under state law, Selvage perfected a bill of exception consisting of testimony by State Senator Craig Washington regarding the legislative history and legislative intent regarding execution of non-triggermen in the adoption of Texas' capital sentencing procedures.

[18]Selvage's attempt to find succor in Judge Henry Friendly's teachings is equally unavailing. Judge Friendly would not require a showing of innocence where the state failed to provide proper procedure for making a defense at trial and on appeal. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, U.Chi. L. Rev. 142, 152-53 (1970). As an example, Judge Friendly cites *Jackson v. Denno*, 378 U.S. 368 (1964), a case addressing a complete absence of state procedures to test the voluntariness of a confession. Here, by contrast, adequate state procedures were available to Selvage, but he elected not to avail himself of them.

Moreover, Selvage's attempt to portray *Penry* error as a denial of a basic trial process is unavailing. The cases where harm is presumed, as noted in *Rose v. Clark*, 478 U.S. at 577-78, 578 n.6, involve such basic rights as the right to counsel, the right to trial before an impartial judge and jury, the right to a jury trial and the right not to bear witness against oneself by the use of a coerced confession. *See Satterwhite v. Texas*, ___ U.S. ___, ___, 108 S.Ct. 1792, 1797 (1988). To conclude that *Penry* error is *per se* harmful is to ignore this Court's holding in *Franklin v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2320 (1988), that the denial of the instructions Selvage now deems "basic trial process" did not preclude consideration of mitigating evidence. It is clear that the potential for harm to Selvage arising from his alleged *Penry* violation is no greater than that faced by the petitioner in *Carrier*, where the prosecutor allegedly withheld exculpatory evidence, items that would be crucial in formulating a defense. Yet, in *Carrier*, the court concluded that the petitioner would have to demonstrate actual innocence to excuse his default of his *Brady* claim. Selvage should shoulder no less a burden.

Stripped of its embellishments, Selvage's claim is that, although state law provided vehicles for consideration of mitigating evidence that had relevance beyond the special issues and for the preservation of his alleged *Lockett-Penry* error if the state court did not provide adequate punishment phase instructions, Selvage nonetheless did not comply with state procedure because he believed it would be futile. To elevate this to the level of a fundamental miscarriage of justice would be to allow a petitioner to manufacture an exception to the procedural default doctrine so large that it would, at the very least, effectively overrule *Engle v. Isaac* and, more probably, eviscerate the doctrine entirely.

B. Because Selvage does not demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational juror could have concluded that a death sentence was appropriate, he fails to demonstrate actual innocence of the death sentence sufficient to excuse his procedural default.

Having determined that a fundamental miscarriage of justice may be established by Selvage only if he can make a showing of actual innocence of a death sentence, the task remains to determine what constitutes actual innocence in a capital sentencing context. At the outset, certain undeniable axioms must be stated. First, the death penalty is a constitutionally appropriate sentence for persons who commit intentional homicides during the course of committing other felonies. *Jurek v. Texas*, 428 U.S. at 270-71. Selvage, whose guilt of murder during the course of committing robbery was established by overwhelming evidence, cannot claim that because of the alleged *Penry* error he is probably innocent of his death sentence in this regard.

Second, the death penalty is a constitutionally appropriate sentence for a person who is a major participant in a felony and who displays a reckless indifference to human life. *Tison v. Arizona*, 481 U.S. ___, ___, 107 S.Ct. 1676, 1688 (1987). Selvage, who planned the robbery of Ventura's Jewelry with Wilbur Kelly, who entered the store armed with a loaded pistol and who fired several shots in effectuating an escape, cannot claim that because of the alleged *Penry* error he is probably innocent of the death sentence in this regard.

Third, it is constitutionally permissible to impose a death sentence on a person who, by his actions, intends or contemplates that human life will be taken. *Enmund v. Florida*, 458 U.S. 782 (1982). Nothing in Selvage's recently related "evidence" challenges the jury's determination beyond a reasonable doubt that Selvage's actions were committed deliberately and with the reasonable expectation that death would result. Selvage thus cannot claim that because of the alleged *Penry* error in his case, he is probably innocent of the death sentence in this regard.

Fourth, it is constitutionally permissible to impose a death sentence on a person who was sixteen years of age or greater at the time of his offense. *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969 (1989). Selvage, who was 28 at the time of his crime, cannot claim that because of the alleged *Penry* error he is actually innocent of the death sentence in this regard.

Fifth, it is constitutionally permissible for a sentencer to base its decision to impose a death sentence on a determination that a defendant will probably commit future acts of violence that will constitute a continuing threat to society. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Barefoot v. Estelle*, 463 U.S. 880 (1983). Evidence of Selvage's future dangerousness was overwhelming, including two prior felony convictions, one escape attempt and a prior capital murder. While Selvage's recently related "evidence" does somewhat relate to his future dangerousness, it largely duplicates the evidence offered at trial through his sister and Dr. Garcia. Indeed, Selvage asserts that this newly related material would have helped establish his future dangerousness. Hence, Selvage cannot complain that, because of the alleged *Penry* error in his case, he is

probably innocent of the death sentence insofar as it is based on his future dangerousness. .

Finally, the mere fact that a defendant's background or character may have mitigating aspects or that there are factors that mitigate his culpability for his crime does not establish his actual innocence of a death sentence. While Selvage asserts that the alleged *Penry* error in his case caused counsel to forego investigation and presentation of psychiatric evidence such as that related by Dr. Merikangas, he simply cannot legitimately contend that this evidence, when contrasted with the overwhelming evidence of aggravation, renders him actually innocent of a death sentence.

Thus, it is apparent that a defendant can establish actual innocence of the death penalty by establishing that he is a member of a class for whom a death sentence is not available as a matter of constitutional or state law. Therefore, if a petitioner could establish that he was not within a sufficiently narrowed class of offenders to meet constitutional standards, he would be actually innocent of the death sentence. Likewise, if a petitioner could establish that he fit within the rules of *Tison* and *Enmund*, or *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687 (1988), or that he was actually innocent of one of Texas' special issues, he would be actually innocent of a death sentence. Selvage clearly has not made such a showing, and thus cannot be considered actually innocent of the death sentence in this regard.

The problem this Court faces is the manner in which it views evidence that mitigates against a death sentence but does not compel a sentence less than death as a matter of law. The state fully concurs with *Amicus* Criminal Justice Legal Foundation's position

that, given the potential for speculation inherent in an inquiry into actual innocence arising from such mitigating evidence, the analysis should end with a determination that the petitioner does not fall within an exempt class. *See* Brief of *Amicus* CJLF at 25-30.[19] However, should the Court not agree with this position, it then must devise a mechanism for determining actual innocence in this context.

The Court has made clear that the fundamental miscarriage of justice exception to procedural defaults is limited to "extraordinary cases." To ensure that the case of a fundamental miscarriage of justice is the "extraordinary case," a finding of actual innocence must necessarily be a greater burden than either the requirement of cause or prejudice in *Sykes* or any of the other safeguards designed to prevent fundamentally unjust convictions. The right to effective assistance of counsel acts as a safeguard to prevent miscarriages of justice, and a valid claim of ineffective assistance of counsel will constitute cause for a procedural default. *Carrier*, 477 U.S. at 488-89, 496. To sustain a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner must establish a probability of a different result sufficient to "undermine confidence in the outcome." If counsel's errors arose in the context of capital sentencing, a petitioner claiming ineffective assistance of counsel, which addresses the fundamental fairness of a state trial, *Id.* at 697, must demonstrate that, but for

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[19]*Amicus'* position was informed by an apparently well founded concern of judicial overreaching in determining actual innocence of a death sentence. *See* Brief of *Amicus* CJLF at 30 n.15. While the state is confident that it can devise a rule that will minimize, if not eliminate, such overreaching, adoption of Selvage's proposed rule that the defendant is "undeserving" of the death sentence would not serve this end. Such a highly subjective rule would invariably invite such overreaching.

counsel's errors, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694-95. Because a demonstration of a fundamental miscarriage of justice is necessarily greater than that necessary to establish a denial of fundamental fairness, *Murray v. Carrier*, 477 U.S. at 493-96, probable actual innocence of a death sentence must necessarily require a greater showing of prejudice than that required to establish prejudice under *Strickland*. Moreover, to allow the same or a lesser showing of prejudice to establish a fundamental miscarriage of justice would effectively undermine the cause and prejudice test and cause the "extraordinary case" to become an "all too ordinary one." *Dugger v. Adams*, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6.[20]

The Court has, of course, adopted a rule designed to prevent unjust incarcerations based upon insufficient evidence. *Jackson v. Virginia*, 443 U.S. 307 (1979). Adoption and modification of the *Jackson* standard to reflect the fact that the burden of production and persuasion of mitigating evidence may properly be placed on the defendant, *Patterson v. New York*, 432 U.S. 192, 201-02 (1977), would provide an appropriate safeguard to prevent a miscarriage of justice. Hence, for a petitioner to establish his actual innocence of a death sentence, he would have to demonstrate the existence at the time of trial of mitigating evidence so compelling that no rational factfinder, properly instructed and viewing all of the

[20]Indeed, the Court in *Dugger v. Adams*, ___ U.S. at ___ n.6, 109 S.Ct. at 1217 n.6, recognized that the fact that confidence in the sentencing outcome may be undermined--the consideration underlying *Strickland* prejudice--is insufficient to demonstrate a fundamental miscarriage of justice.

reliable evidence in existence at the time of trial,[21] could have concluded that a death sentence was appropriate.

Selvage does not meet this standard. While he goes to great lengths to minimize his involvement in the murder of Albert Garza, the fact remains that Selvage planned the robbery with Kelly, Selvage entered the store prepared to use lethal force with a loaded pistol, and Selvage in fact used lethal force. Rather than support a claim that Selvage lacked an intent to kill, the most logical inference from the evidence is that, at best, Kelly merely beat him to the kill.[22]

The psychiatric evidence Selvage now proffers is even less compelling. The reliability of Dr. Merikangas' findings, insofar as they relate to psychological disorders that existed at the time of trial, is highly suspect. The mere fact that the evaluation occurred nine years after the fact substantially reduces its reliability. Moreover, Merikangas' observations of bizarre behavior are completely at odds with trial counsel's observations of Selvage upon arrest, in preparing for trial and at trial, wherein he was lucid, coherent, appropriately responsive, soft spoken and

[21]Judge Friendly makes clear that all evidence in existence at the time of trial, even if it was excluded as illegally obtained or became available only after trial, with due regard to any unreliability in the evidence, should be considered in determining actual innocence. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi. L. Rev. at 160.

[22]It is by no means a foregone conclusion that Selvage did not kill the deceased. As the prosecutor made clear in his punishment argument, there is substantial circumstantial evidence indicating Selvage was the triggerman (R VII 2969-70).

well mannered and possessing good memory of events. *See* attached Appendix B at B-1-4. Further, review of Selvage's two confessions (R VIII 3038-39) and Selvage's testimony during pretrial motions (R II 775-837) confirms counsel's observations. Thus, the possibility of the severe psychosis which Selvage now complains existed at the time of trial seems remote. Whatever mitigating value evidence of Selvage's 1980 mental condition would have possessed, it can hardly have been of such a compelling nature, when compared with the overwhelming evidence in aggravation, to mandate a life sentence.

In sum, it is clear that Selvage cannot make a showing that the alleged *Penry* error precluded consideration of evidence establishing his innocence of his death sentence, either by showing he is in a class for which a death sentence is unavailable or by demonstrating the existence of compelling mitigation that would not allow any rational factfinders to conclude death was an appropriate sentence. Selvage's procedural default is thus not excused.

CONCLUSION

For the above reasons, the state respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX A

January 19, 1988, Affidavit of John Emmett Crow

APPENDIX A

AFFIDAVIT OF JOHN EMMETT CROW

County of Harris)
) **ss:**
State of Texas)

JOHN EMMETT CROW, being duly sworn according to law, deposes and says:

1. I am an attorney at law duly licensed to practice my profession in the State of Texas. My address is 1027 South Main, Suite B, Pasadena, Texas 77506.

2. I was one of the defense attorneys who represented John Henry Selvage in Case No. 305,495 in the 230th District Court of Harris County, Texas, in which Mr. Selvage was convicted of capital murder and sentenced to death. I have been asked to provide this affidavit in relation to my representation of Mr. Selvage.

3. The question which I have been asked concerns the absence of any evidence presented by the defense in the penalty phase of the trial with respect to Mr. Selvage's mental and emotional impairment.

(a) My co-counsel and I decided early in our representation of Mr. Selvage that we would not present evidence of mental illness in the penalty phase of the trial, no matter how strong it was, because we believed the jury would not be able to consider such evidence as a mitigating circumstance.

(b) By the time this case was tried in early 1980, the State's use of Dr. Ernest Grigson to show that a capital defendant would likely be dangerous in the future was well known. Whatever the disorder suffered by a capital defendant, from antisocial personal disorder to major mental illnesses like schizophrenia, Dr. Grigson was able to persuade juries that *any disorder increased the likelihood* that the defendant would be dangerous in the future. Once the jury found that mental illness increased the likelihood of the defendant's future dangerousness, the jury was obliged to answer Special Issue 2 "yes." Through the use of witnesses like Dr. Grigson, therefore, the State was able to convert otherwise mitigating evidence like mental illness into evidence in support of an aggravating circumstance.

(c) Since the jury was able to consider only one other question in Mr. Selvage's case -- the deliberateness question posed by Special Issue 1 -- we were convinced that even if we did present evidence of mental illness, with the problems attendant to Special Issue 2, the jury would still have no meaningful way of considering the mental illness evidence as a mitigating circumstance. The jury could quite readily find that the homicide was sufficiently deliberate to answer Special Issue 1 "yes" even if Mr. Selvage did suffer from a severe mental illness. In our experience it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate

acts. And if the jury answered Special Issue 1 "yes," having already answered Special Issue 2 "yes," the death sentence was mandatory.

(d) Given these considerations, we decided that Mr. Selvage's interests could not be served by investigating and presenting evidence of any mental illness from which he suffered. On the one hand, the jury could be forced to treat such evidence as aggravating, and on the other, the jury was extremely unlikely to consider mental illness as negating the deliberateness of the crime. The jury was given no third option under the Texas statute -- to consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Selvage.

4. If, on the other hand, Texas had offered such a third option to the jury, our strategy would have been different. At the very least, we would have investigated Mr. Selvage's mental health history. And if we had found evidence of serious mental illness, we likely would have presented it. Even though, in such circumstances, evidence of mental illness might still have increased the possibility that the jury would find that Mr. Selvage posed a threat of future violence, the evidence could have served as an even stronger countervailing factor -- as a reason to impose life that was weightier than the reason to impose death because of the threat of future dangerousness. Without investigation, we could not have known if such

evidence was available to Mr. Selvage -- so at a minimum, we would have investigated this matter.

/S/
JOHN EMMETT CROW

Subscribed and sworn before me
this 19th day of January, 1988.

/S/
NOTARY PUBLIC

My Commission Expires: 10-13-90

APPENDIX B

February 16, 1988,
Affidavit of John Emmett Crow

APPENDIX B

NO. 305495-B

EX PARTE	**IN THE 230th DISTRICT COURT OF**
JOHN HENRY SELVAGE, Applicant	**HARRIS COUNTY, TEXAS**

AFFIDAVIT OF JOHN E. CROW

My name is John E. Crow. I am an attorney licensed to practice law in the State of Texas, having been so licensed since 1973. My business address is 1207 South Main, Suite B, Pasadena, Texas.

Dennis Kelly and I were appointed by the Honorable Joe Kegans to represent John Henry Selvage in the primary case. Although the docket sheet reflects that Mr. Kelly and I were appointed as counsel much later, we were actually appointed prior to Mr. Selvage's arrest on August 9, 1979 in New Orleans, Louisiana.

On or about August 10, 1979, I received a telephone call from the coordinator of Judge Kegans' court informing me that my client had been arrested in New Orleans. I immediately sent three telegrams to New Orleans, one to the parish Sheriff, one to the District Attorney and one to the officer in charge of the investigation. Additionally, I left by plane for New Orleans on August 10 and arrived at the New Orleans jail sometime around 2:00 p.m. Once there, I introduced myself to Mr. Selvage and explained that I had been appointed by the court to defend him against the capital murder charge that had been filed against him. Additionally, I advised him not to make any

statement to the police. Before I left to pick up Mr. Kelly at the airport, I gave Mr. Selvage my business card. Mr. Selvage appeared lucid and coherent. He indicated that he understood the charges against him and responded appropriately to the questions I asked.

Upon my return with Mr. Kelly a few hours later, we interviewed our client more thoroughly concerning commission of the offense and the circumstances surrounding his arrest. We found Mr. Selvage to be soft-spoken and well-mannered. In a coherent manner he recounted the details of the capital offense, as well as the manner in which his two confessions had been taken. We both found that Mr. Selvage had a good memory in terms of remembering the details of the offense.

In addition to these initial interviews, both Dennis Kelly and I visited with Mr. Selvage on numerous occasions. At no time during the course of the investigation, trial preparation or trial itself did Mr. Selvage give any indication that he was anything other than sane at the time he committed the offense and competent to stand trial. He was able to relate details of the offense and consistently took the position that Wilbur Kelly had been the triggerman in the jewelry store robbery. The confessions that he gave, although not admitted into evidence, reflect his ability to communicate his ideas effectively. This was also evident when he took the witness stand in the pre-trial hearing conducted before the court. Additionally, Mr. Selvage communicated freely with Dennis Kelly and me during the course of the trial. He often took notes during testimony and frequently asked Mr. Kelly and me pertinent questions. He also provided us with considerable input and useful information, particularly in the voir dire phase of the trial.

In connection with our investigation, Mr. Kelly and I visited the defendant's home in New Orleans. There, we sat down with Mr. Selvage's family in an attempt to learn more about our client. We learned, among other things, that John came from a very close family and that he had been raised in a fairly stable family environment. We also discovered that he had been an honor student in high school. When asked about prior psychiatric treatment or mental problems, the family indicated there had been none. Although they expressed concern about a change in John's behavior following his military discharge, they attributed the change to his problems with hard drug addiction. This information was consistent with information later revealed to me by the prosecutor, Andy Tobias, in connection with a *Brady* motion. Although I was unable to inspect the military records because of certain disclosure prohibitions, Mr. Tobias represented that the military records he possessed reflected my client's medical discharge based upon his use of alcohol and/or drugs. Mr. Tobias did tender these records to the court and I feel confident that had they reflected any evidence of mental disease or defect, the court would have informed me of that. In the course of my preparation I also asked Mr. Selvage whether he had ever had psychological problems or suffered from any mental illness. While I do not recall his exact response, I feel certain that his response, coupled with my personal observations and the information that I had gathered, foreclosed any potential insanity defense.

I was very much aware, however, that Mr. Selvage suffered from a serious heroin habit and was probably under the influence of drugs at the time he committed the offense. I did not, however, believe that John suffered from any disease of mind or mental defect that would have interfered with either his ability

to know that his conduct was wrong or his ability to conform his conduct to the requirements of the law. Had I believed that, there is no doubt that I would have requested a psychiatric examination of my client, regardless of my perceptions concerning trial strategy and the presentation of psychological evidence as a mitigating factor. In my professional opinion, I saw no need to have Mr. Selvage undergo a psychiatric exam, particularly since voluntary intoxication and diminished capacity were not and are not available defenses under Texas law.

After reviewing the evidence against our client, Mr. Kelly and I had numerous discussions concerning defense strategy. We determined that our best strategy was a two-prong attack on the State's evidence. First, we hoped to successfully impeach the identification testimony of the State's witnesses and argue that the State had failed to prove beyond a reasonable doubt that John Selvage had even been present at the jewelry store robbery. We ultimately attempted to show that someone else, possibly Eugene Wadis, had been present with co-defendant Wilbur Kelly and Brenda Joseph. Secondly, we hoped to prove that no one ever saw a gun in Mr. Selvage's hand during the commission of the robbery. This position dove-tailed with our legal argument challenging the sufficiency of the evidence to support an affirmative answer to special issue number one. Since there was no evidence that John Selvage was the actual triggerman in the robbery, and since the court refused to submit a special issue concerning our client's participation as triggerman, we considered the imposition of the death penalty to be both immoral and unconstitutional.

It was also part of our strategy not to present psychological testimony concerning Mr. Selvage's drug problem and drug-related mental condition. We reasonably believed that such evidence would function

as a "double-edged sworn." While the jury might view my client's drug addiction and attendant emotional problems as mitigating circumstances, it was equally plausible that they could perceive them as aggravating factors that enhanced the likelihood of future dangerousness. Too, I was convinced that a psychiatric exam would not provide us with any benefit, i.e. either an insanity defense or a finding of incompetence. In my opinion, the benefits of a psychiatric evaluation were far outweighed by the potentially harmful evidence said evaluation might produce -- evidence the State might find useful at punishment either in their case-in-chief or in rebuttal. In that regard, we chose to submit evidence of my client's problem to the jury through a less problematic method. In the punishment phase of the trial the defense called two witnesses. The first, Mr. Selvage's sister, testified concerning John's family background and his accomplishments as a young adult. She also explained how John's addiction to heroin had changed him. Our second witness, Dr. Jose Garcia, testified concerning the rehabilitation programs and counseling services available to inmates, as well as the psychological treatment program for drug addiction. We hoped that this evidence would provide the jury with some basis for believing that John Selvage, with proper treatment and therapy in the Texas Department of Corrections, would not constitute a continuing threat to society. Our final arguments, I believe, reflected our strategy to obtain negative answers to the special issues based on our position that John Selvage had never shot anyone and that he could be rehabilitated within the confines of the penitentiary.

/S/

JOHN E. CROW

THE STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, on this day personally appeared John E. Crow, who being personally known to be to be a credible person, and who, after being duly sworn on oath by me deposes and acknowledges the following:

"I have personal knowledge of the above and foregoing facts and they are true and correct."

Subscribed and sworn to before me this 16th day of February, 1988.

/s/
NOTARY PUBLIC AND AND FOR
THE STATE OF TEXAS

Printed Name

Commission Expiration